

SULLIVAN PAPAIN BLOCK McGRATH & CANNAVO P.C.

120 BROADWAY • NEW YORK • NEW YORK 10271

TELEPHONE: (212) 732-9000

FACSIMILE: (212) 266-4141

SPBMC-NY@TrialLaw1.com

www.TrialLaw1.com

Robert G. Sullivan  
Nicholas Papain  
Michael N. Block  
Christopher T. McGrath  
Vito A. Cannavo  
John F. Nash  
Frank V. Floriani

Marie Ng  
Eleni Coffinas  
David J. Dean  
Hugh M. Turk  
Albert B. Aquila  
Brian J. Shoot  
Andrew J. Carboy

PLEASE REPLY TO:  
New York City Office

Cheol I. Kim  
Eric K. Schwarz  
Mary Anne Walling  
Elizabeth Montesano  
Matthew J. Jones  
Deanne M. DiBlasi  
Beth N. Jablon  
Liza A. Milgrim  
Susan M. Jaffe  
Donte Mills  
Christopher P. Spina

Jeffrey B. Bromfeld  
Wendell Y. Tong  
Benjamin J. Wolf  
Terrence L. Tarver  
Michael J. Wells  
Noemi Puntier  
Clifford S. Argintar  
Jocelyn E. Lupetin  
Kerry A. McManus  
Thomas J. McManus

John M. Tomskey  
George J. Pfluger  
*Counsel to the Firm*

Herman Badillo  
Hon. Joseph N. Giamboi (ret.)  
Stephen C. Glasser  
*Of Counsel*

August 10, 2009

The Honorable Nicholas G. Garaufis  
United States District Judge  
Eastern District of New York  
United States Courthouse  
225 Cadman Plaza East - Room 659  
Brooklyn, New York 11201

Re: U.S.A. and Vulcan Society, et al. vs. City, et al.  
Civil Action No.: 07-cv-2067 (NGG) (RLM)

Dear Honorable Garaufis:

The undersigned are attorneys for the Uniformed Firefighters Association (hereinafter "UFA") in the above captioned proceeding. We are submitting this letter, with the Court's permission, as a motion by the UFA to intervene as a party defendant in the remedy phase of this action, pursuant to Rules 24(a)(2) and 24(b)(2) of the F.R.C.P.

BACKGROUND

This action, initially brought by the United States of America (hereinafter "U.S.A.") asserts that two New York City Fire Department ("FDNY") entry level examinations for the position of firefighter (Exams designated as Nos. 7029 and 2043) had a disparate impact on black and Hispanic candidates and violated Title VII of the Civil Rights Act of 1964. In addition, plaintiff-intervenors (hereinafter collectively, the "Vulcans") assert a claim of disparate treatment against the defendants.

SULLIVAN PAPAIN BLOCK McGRATH & CANNAVO P.C.

Re: U.S.A. vs. City  
August 10, 2009  
Page 2 of 6

This Court, in a Memorandum and Order dated July 22, 2009, granted summary judgment to the U.S.A. and the Vulcans on their disparate impact claims and noted that "an appropriate remedy must now be considered by the court" (Memorandum and Order, Docket Entry #294, p. 93). The UFA seeks to be a party in the Court's consideration of that appropriate remedy.

THE UFA'S PRIOR INTERVENTION MOTION

Shortly after this action was commenced and prior to the intervention by the Vulcans, the UFA moved to intervene as a party defendant in the liability phase of the case. The UFA requested both intervention as of right [F.R.C.P. Rule 24(a)(2)] and permissive intervention [F.R.C.P. Rule 24(b)(2)]. Essentially, the UFA argued that its intervention was proper to protect the safety of firefighters and the public by preserving hiring based upon merit. [See UFA's Motion to Intervene (Docket Entry #15); its Supporting Memorandum of Law (Docket Entry #16); and its Reply Memorandum of Law (Docket Entry #28). The UFA's Motion to Intervene was opposed by the U.S.A. but its Memorandum in Response to the UFA's motion also stated:

However, the United States believes that the UFA should be joined as a non-liability party pursuant to Rule 19 of the Federal Rules of Civil Procedure because some forms of relief sought by the United States, such as retroactive seniority, may affect rights and obligations of the UFA's members under the union contract (Docket Entry #22, p.2).

The plaintiff's Memorandum also successfully urged bifurcation of the liability and relief phases of the case. It argued that if bifurcation was granted, the relevant authority supported denial of the UFA's intervention in the liability phase. However, again the government recognized the union's right to intervention in the relief phase to protect any legally cognizable interest the UFA might have in a possible remedy (Docket Entry #22, pp. 6-7). The plaintiff's Memorandum also noted that "it appears that the UFA has an interest in the seniority rights of its members under the collective bargaining agreement between the UFA and the City" and that "[s]eniority rights of incumbent firefighters may be affected by the relief sought by the United States in this case. . . ." (Docket Entry #22, p. 13). The Memorandum further recognized that the City's interest in the relief phase "may not coincide with the UFA's interest in protecting the seniority rights of incumbent firefighters" (Docket Entry #22, p. 14).

SULLIVAN PAPAIN BLOCK McGRATH & CANNAVO P.C.

Re: U.S.A. vs. City  
August 10, 2009  
Page 3 of 6

The U.S.A. did not object to the UFA's "limited participation in relief proceedings in this case [including any proceedings related to approval and entry of a consent decree by the Court] pursuant to Rule 19 of the Federal Rules of Civil Procedure" (Docket Entry #22, p. 14). Alternatively, it suggested that the UFA be permitted to intervene only in the relief phase of the case "for similarly limited purposes" (Docket Entry #22, p. 15).

Counsel for the Vulcans also recognized the UFA's right to intervene in the remedy phase in their letter to this Court dated August 17, 2007 (Docket Entry #41). That letter opposed the UFA's intervention in the liability phase, but stated:

This is not to say that they should not be involved at a remedy stage, if liability is proven in the first phase of this litigation (Docket Entry #41, p. 1).

THE COURT'S DENIAL OF THE UFA'S INTERVENTION REQUEST

In a Memorandum and Order (Docket Entry #47) dated September 5, 2007 this Court granted bifurcation of the liability and relief phases of the case. It also denied the UFA's motion to intervene as a party defendant. However, the Court invited the UFA to participate as a friend of the Court regarding issues raised in the litigation, "particularly the safety of firefighters" (Docket Entry #47, p. 10). The Court also recognized the UFA's interest in the remedy phase of this case. It stated:

Finally, and importantly, because the UFA clearly has an abiding interest in the implementation of a remedy, I want to make it clear that the court would be reluctant to approve any settlement containing any remedy that affects the safety of the firefighters without the participation of the UFA. This union deserves a place at the bargaining table (Docket Entry #47, p. 10).

Although the Court did not actually issue a ruling on whether the UFA could intervene in the remedy phase, it recognized the potential interest of the UFA in the outcome of the case as it may affect the seniority rights of its members. The Court stated:

SULLIVAN PAPAIN BLOCK McGRATH & CANNAVO P.C.

Re: U.S.A. vs. City  
August 10, 2009  
Page 4 of 6

Incumbent firefighters' seniority rights may be affected in this case because individuals given hiring relief may be granted retroactive seniority. The UFA has an interest in such relief (Docket Entry #47, p. 13).

Accordingly, the Court granted the right to the UFA to renew its intervention motion at a later date.

THE UFA SHOULD BE PERMITTED TO INTERVENE IN THE REMEDY PHASE

As noted in the Court's recent decision granting summary judgment, the U.S.A. and the Vulcans seek various forms of injunctive and monetary relief. Among the remedies they desire is some form of preferential hiring with retroactive seniority for individuals found to have been victims of discrimination in the City's hiring procedures (Docket Entry #22, pp. 13-14).

As noted in the accompanying Affidavit of UFA President, Stephen J. Cassidy, seniority has a definite impact upon the ability of firefighters to be promoted, as well as upon the right to transfer and the ability to be selected to work on special assignments.

For example, under the rules currently governing eligibility to participate in the promotional exam to the rank of Lieutenant, an individual must first have served for three years as a firefighter. Moreover, to actually be promoted to that rank, the firefighter must have reached 1<sup>st</sup> grade - a process that takes five years from the date of hire. Candidates for promotion to Lieutenant can receive credit for up to 10 years of seniority to improve their position on the rank order promotional hiring list.

It is certainly likely that plaintiffs and plaintiff-intervenors will seek the benefit of retroactive seniority for promotional purposes, as well as pension and pay purposes. If successful, persons granted the retroactive seniority could, in effect, leap-frog over incumbents who have actually served as firefighters for the full term of their seniority claim. Such incumbents could, therefore, be denied promotion or suffer a significant delay in moving to a higher rank. Similarly, the ability of incumbents to transfer to more desirable fire companies or to obtain higher paying special assignments could be adversely affected.

SULLIVAN PAPAIN BLOCK McGRATH & CANNAVO P.C.

Re: U.S.A. vs. City  
August 10, 2009  
Page 5 of 6

Further, as noted, the U.S.A. has already conceded that the City's interest may not coincide with the UFA's interest in protecting the seniority rights of its members (Docket Entry #22, p. 14). As the exclusive bargaining agent for firefighters, the UFA has a greater concern than the City that its members' rights not be unfairly trampled by the mechanism of retroactive seniority granted to individuals who receive benefits in the remedy phase of this case. The City may very well have little interest in preventing those granted retroactive seniority in this case from using that seniority for promotional purposes. Such use might, in fact, reduce any monetary damages the City could owe those individuals for delaying not only their hiring, but their promotion.

Moreover, in Brennan v. N.Y. City Bd. of Educ., 260 F.3d 123, 133 (2<sup>nd</sup> Cir., 2001), the Second Circuit expressly recognized the possibility that a municipality could have a greater interest in ending litigation by settlement "involving the displacement of employees who are not parties to the action" than in avoiding such potential discrimination.

The UFA is also entitled to permissive intervention under F.R.C.P. Rule 24(b)(2) as its defenses on the issue of retroactive seniority have common questions of law and fact as may be interposed by the City of New York.

THE UFA DOES NOT OPPOSE MONETARY  
RELIEF FOR THE VICTIMS OF DISCRIMINATION

At the conference before this Court on August 6, 2009, counsel for the Vulcans stated:

MR. LEVY: I don't object to them intervening and being involved with certain aspects of the remedy phase that effect the members of the union. But there are parts of the remedy that really have nothing to do with the union; back pay and other kinds of damages that may float to members of the class.

Frankly, it's hard enough to have the discussions with us and the government and the city and bringing in another party in that doesn't really have a

SULLIVAN PAPAIN BLOCK McGRATH & CANNAVO P.C.

Re: U.S.A. vs. City  
August 10, 2009  
Page 6 of 6

stake in those issues, is not helpful,  
I think.

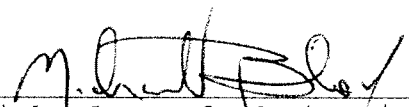
(Transcript of the conference of August 6, 2009, p. 18 - the entire transcript is annexed hereto as "Exhibit A".

The UFA is unclear about the basis for the concern expressed by Vulcans' counsel. The UFA has no objection to the award of monetary damages to the victims of discrimination, including back pay. The presence of the UFA in the remedy phase will not interfere with such relief.

Accordingly, for the reasons stated above, the UFA respectfully requests this Court for permission to intervene as a party defendant in the remedy phase of this case.

Respectfully yours,

SULLIVAN PAPAIN BLOCK  
McGRATH & CANNAVO P.C.

By:   
Michael N. Block (MNB/0957)

MNB:law

cc: Magistrate Roanne L. Mann  
Service List

(UF-068518)

**EXHIBIT "A"**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA

Plaintiff : 07-CV-2067

-against- : U.S. Courthouse

THE CITY OF NEW YORK : Brooklyn, N.Y.

Defendant : August 6, 2009

- - - - - X 2:30 p.m.

BEFORE:

HONORABLE NICHOLAS G. GARAUFIS  
United States District Judge

APPEARANCES:

For the Plaintiff: UNITED STATES DEPARTMENT OF JUSTICE  
Civil Rights Division  
Employment Litigation Section  
P.O. Box 65968  
Washington, D.C. 20035-5968  
BY: SHARON A. SEELEY  
VARDA HUSSAIN

AND

BENTON J. CAMPBELL  
United States Attorney  
271 Cadman Plaza East  
Brooklyn, New York 11201  
BY: ELLIOT M. SCHACHNER  
DAVID M. ESKEW

For the Intervenor: LEVY RATNER, P.C.  
Vulcans 80 Eighth Avenue  
New York, New York 10011-5126  
BY: RICHARD A. LEVY  
DANA E. LOSSIA



1 For the Intervenor:  
Vulcans  
2  
3  
4  
5  
6  
7

CENTER FOR CONSTITUTIONAL RIGHTS  
666 Broadway  
Seventh Floor  
New York, New York 10012  
BY: ANJANA SAMANT

4  
5  
6  
7

VULCAN SOCIETY, INC.  
Fire Department City of New York  
739 Eastern Parkway  
Brooklyn, New York 11213  
BY: JOHN COOMBS, President  
PAUL WASHINGTON

8 For the Defendant:  
City of New York  
9  
10  
11  
12  
13  
14  
15

NEW YORK CITY LAW DEPARTMENT  
Office of the Corporation Counsel  
100 Church Street  
New York, New York 10007-2601  
BY: GEORGIA PESTANA  
Chief, Labor and Employment  
Law Division  
AND  
JAMES M. LEMONEDS  
Senior Counsel/Trial Specialist  
AND  
WILLIAM S.J. FRAENKEL

16 For the UFA:  
17  
18  
19  
20

SULLIVAN PAPAIN BLOCK  
McGRATH & CANNAVO, P.C.  
120 Broadway  
New York, New York 10271  
BY: MICHAEL N. BLOCK

21 Court Reporter:  
22  
23  
24

RONALD E. TOLKIN, RMR, CRR  
225 Cadman Plaza East  
Brooklyn, New York 11201  
718-613-2647

24  
25

Proceedings recorded by mechanical stenography, transcript  
produced by Computer-Assisted Transcript.

U.S.A. v. CITY OF NEW YORK

3

1 THE CLERK: Counsel, please state your appearances.

2 MS. SEELEY: Good afternoon, Your Honor.

3 Sharon Seeley for the United States.

4 MR. SCHACHNER: Good afternoon, Your Honor.

5 Elliot Schachner, Assistant United States Attorney.

6 MS. HUSSAIN: Good afternoon, Your Honor.

7 Varda Hussain for the United States.

8 MR. ESKEW: Good afternoon, Your Honor.

9 David M. Eskew for the government.

10 MR. LEVY: Richard Levy on behalf of Vulcan.

11 MS. LOSSIA: Dana E. Lossia on behalf of the  
12 Intervenors, Vulcan.

13 MS. SAMANT: Anjana Samant on behalf of the  
14 intervenors Vulcan from the Center for Constitutional Rights.

15 MR. COOMBS: Good afternoon, Your Honor.

16 I am John Coombs, president of Vulcan Society, Inc.

17 MR. WASHINGTON: Good afternoon, Your Honor.

18 Paul Washington of Vulcan Society.

19 THE COURT: For the defense?

20 MS. PESTANA: Good afternoon, Your Honor.

21 For the City of New York, I am Georgia Pestana.

22 THE COURT: Good afternoon.

23 MR. LEMONEDES: James M. Lemonedes on behalf of the  
24 City of New York, as well, Your Honor.

25 MR. FRAENKEL: William Fraenkel for the City of New

U.S.A. v. CITY OF NEW YORK

4

1 York.

2 THE COURT: Okay. Well, we know where we are.  
3 Let's find out where we're going. Let me hear from the  
4 government first.

5 MS. SEELEY: Your Honor, in response to the question  
6 of Your Honor's order, there is discovery that will be needed  
7 for the relief phase. But the discovery that we need depends,  
8 we believe, on a few preliminary issues that should be decided  
9 early so we know what discovery is necessary and exactly how  
10 we'll go about it.

11 And those issues are, first, in a case such as this,  
12 where we're seeking both injunctive relief and individual  
13 relief for the individuals who are harmed by the unlawful  
14 practices that would consist of monetary relief and priority  
15 hiring relief.

16 When it comes to the monetary relief and priority  
17 hiring relief, there are essentially two ways that the Court  
18 can go about the relief phase. The first of those ways is to  
19 essentially take an approach of individualized hearings where  
20 all of the potential individuals who would get relief, we need  
21 to do discovery with respect to them and the Court essentially  
22 holds mini hearings for each of them to determine how much  
23 money they made in the interim, their employment history, how  
24 much they would have made had they been hired, when they would  
25 have been hired, and all of the things for each of the

1 individuals in this case.

2           In this case, we have somewhere between 35 hundred  
3 and well over 7,000 potential individuals who would be  
4 entitled to relief. So what we would request is that the  
5 Court take the second approach to individual relief, which is  
6 to order relief on essentially a class wide basis. And what  
7 the Court can do there is to determine a total amount of  
8 monetary relief to be shared by all the individuals eligible  
9 for that relief, as well as a total number of priority hires  
10 for the individuals who are seeking and qualified for priority  
11 hiring.

12           That can be done without getting information about  
13 each individual and their employment history and all of that,  
14 and it's much more efficient. Other Courts have taken this  
15 approach either when the parties have agreed to it or when the  
16 Court has found it would be impossible to determine with any  
17 reasonable degree of certainty who would have actually got the  
18 limited number of jobs that, absent discrimination, would have  
19 gone to blacks and Hispanics, for example.

20           So that's the first preliminary issue that we think  
21 should be addressed and we think would change what discovery  
22 has to be done.

23           The second issue is actually the issue that was  
24 raised in the City's letter to the Court of July 31st, where  
25 the City said that there are equal protection issues and due

1 process issues that they think, I guess, would stand in the  
2 way of settlement. And it seems it would also perhaps change  
3 the direction of discovery here depending on what kind of  
4 relief might be available given whatever the equal protection  
5 and due process concerns are.

6 And I'll be honest, I'm not sure I understand  
7 exactly what those are, given the liability judgment, which  
8 means there has been actual discrimination here, what those  
9 concerns are. But if they're legal concerns, then we think  
10 they should be dealt with up front so we know what kinds of  
11 relief will be available in this case and we can limit our  
12 discovery to those kind of reliefs.

13 THE COURT: Well, wouldn't it be useful to send you  
14 back to the Magistrate Judge to complete discovery?

15 MS. SEELEY: It may well, Your Honor. But some of  
16 these issues, this Court may need to make determinations with  
17 respect to before we go back to the Magistrate Judge and do  
18 that discovery.

19 THE COURT: Okay.

20 MS. SEELEY: The last issue that I see kind of as a  
21 preliminary issue that effects everything else is the issue of  
22 class certification. I know in Your Honor's previous order  
23 certifying the class with the Vulcans and the individuals as  
24 class representatives, Your Honor left some issues to be open  
25 to be revisited when we reached the relief phase. And

U.S.A. v. CITY OF NEW YORK

7

1 obviously, we are there now.

2 THE COURT: Of your case?

3 MS. SEELEY: Of the disparate treatment case,  
4 correct, Your Honor.

5 So we think that that should be addressed early,  
6 right up front as well. Because depending who Mr. Levy and  
7 the Vulcans may be representing, it may change how we have to  
8 go about discovery with respect to individuals.

9 THE COURT: Okay.

10 MS. SEELEY: So those are the preliminary issues.  
11 The only other thing that I guess I wanted to raise is the  
12 question Your Honor just raised, actually, the disparate  
13 treatment claims still need to be decide. And what we would  
14 request is that essentially relief discovery, relief  
15 proceedings on the disparate impact claims go on a parallel  
16 track with the remainder of discovery and any other  
17 proceedings in the liability phase of disparate treatment  
18 claims, so that we can not delay relief and hopefully get  
19 everything wrapped up as quickly as possible.

20 THE COURT: Thank you.

21 Let me hear from Mr. Levy.

22 MR. LEVY: Judge, we're in substantial agreement  
23 with the government on the positions that you just heard  
24 about. On the discovery, I think we can do this with the  
25 Magistrate. I completely agree that we should go ahead with

U.S.A. v. CITY OF NEW YORK

8

1 relief discovery now, even while we're still working out the  
2 disparate treatment case. Because if we prevail there, I  
3 think it would just potentially add to the relief and we can  
4 look at it then. But we wouldn't want to hold this case up  
5 anymore, so I would like to see us proceed on discovery.

6           On the equal protection argument, I agree that we  
7 should get that resolved as quickly as we can and bring in any  
8 parties at this time who may have an objection, whether that  
9 be the union or the white firefighters who are on the 6019  
10 list, or whoever.

11           On class cert, I'm not sure that I think there's a  
12 substantial question. We have individuals who took Exam 2043  
13 as class representatives. I think they can certainly  
14 represent those who took 7029, because they were, essentially,  
15 identical tests under identical circumstances. The Vulcans  
16 involvement, I think, is essential. Certainly with respect to  
17 how we work out priority hires and other issues that may  
18 affect hiring and the current exam.

19           THE COURT: Are you ready to go forward on the  
20 disparate treatment?

21           MR. LEVY: Pending only the deposition of Mayor  
22 Bloomberg which, I think, is quite an important element of the  
23 disparate treatment case. And it also may be -- and I don't  
24 want to promise it, but it may something that can be decided  
25 on a motion. I'm not sure, but there's an awful lot of

U.S.A. v. CITY OF NEW YORK

9

1 evidence that might be sufficient to establish that case on a  
2 motion. I'd have to take that deposition first to know.

3 THE COURT: Let me hear from the City.

4 MS. PESTANA: We are in some agreement with the  
5 plaintiffs and the intervenors, in that we are interested in  
6 getting this case to closure sooner rather than later.

7 The equal protection concerns that I alluded to in  
8 my letter really have nothing to do with the monetary part of  
9 the case. But if we are contemplating priority hires that  
10 include the granting of competitive seniority to anybody who  
11 is hired or is currently in the Fire Department, that will  
12 impact the rights of the whites who are already in the  
13 department and implicates the equal protection.

14 I think that in order to address at least the  
15 members of the department that are currently there, it's time  
16 for the unions to be allowed to intervene. And I know that  
17 they are here.

18 THE COURT: And I wish they would come up to  
19 counsel's table.

20 MR. BLOCK: Michael Block on behalf of the UFA, and  
21 Steven Cassidy, the president of the union.

22 THE COURT: Have a seat, both of you. Thank you.

23 MS. PESTANA: With respect to the minority hires,  
24 we've always taken the position -- while up until the New  
25 Haven decision, we've always argued that someone's appearance



1 on the list is not a right to anything, it's just an  
2 expectation to be considered. But there's some troubling  
3 language in the Richie decision which seems to indicate that  
4 people on the list have something a little bit more tangible.

5 We're concerned that -- not in that decision, but  
6 another decision that may come down before Your Honor's  
7 decision or this case comes to a closure, may interpret the  
8 people on the list have a stronger right than we previously  
9 thought.

10 So it may be beneficial to either include everyone  
11 on the 6019 list, depending on where the priority hires come  
12 from, and who will be impacted by the priority hires. We  
13 would have to think about whether we need to bring those  
14 people in because the union represent applicants. So their  
15 interests need to be represented.

16 THE COURT: I understand. I read the Richie  
17 decision, and I read the concurrences as well. Everybody has  
18 -- on the majority side, has its own prospective on where this  
19 area of law is moving. I don't have a crystal ball.

20 And I think we're going to have a new justice on the  
21 Supreme Court, hopefully by the end of the day. So I can't  
22 operate, nor can any of us operate on what may be some day in  
23 the future on this case, should it go up, when it gets to the  
24 appellate level. So that's my only comment on all of that.

25 I understand that there is language in the decision

1 that you allude to. I am concerned about the affect that any  
2 relief will have on incumbent fire fighters, in terms of their  
3 seniority and any other rights that they have under the union  
4 contract.

5 This is not an easy situation, and I'm wondering  
6 whether there has been any effort -- I know you've done it in  
7 the past, but whether there's been any effort to achieve a  
8 solution that doesn't require a judicial decree. Because it's  
9 very complicated, a lot of people's rights are affected by  
10 anything that happens.

11 So I'm wondering whether it might not be useful for  
12 you to visit with Judge Mann one more time and bring her up on  
13 the current status of the case. At least have a sit down as  
14 to whether there's anything that can be done, including the  
15 UFA. That would protect the rights of the current fire  
16 fighters and provide relief to the class represented by the  
17 Vulcans.

18 Have you had any discussion about this, or am I the  
19 only one who has been working on this for the last three  
20 months?

21 MS. PESTANA: We had many discussions in December  
22 and January. I think in late January is the last time that we  
23 talked. The wall we kept hitting was equal protection  
24 concerns and the competitive seniority and our resistance to  
25 that because of the City's resistance to competitive

1 seniority, as well as a couple of other minor things that  
2 probably could be resolved. But that's the issue that really  
3 blocked things.

4           Magistrate Mann was helpful in getting us talking,  
5 but I think we were more fruitful when we sat down over  
6 Christmas and New Years together and tried to hammer out  
7 language. And we were pretty far along before we hit that  
8 wall the last time.

9           In so far as in terms of the disparate treatment  
10 claim, I think the Mayor's deposition is already scheduled for  
11 two weeks from now. So that will be going forward and  
12 Mr. Levy can then decide whether he can make a motion. We  
13 think we may want to make a motion on qualified immunity after  
14 that deposition.

15           I know that Commissioner Scoppetta was the other  
16 individually named defendant who was already deposed. I don't  
17 know if Mr. Levy needs to redepose him on the disparate  
18 treatment claim. But if we're going to make that qualified  
19 immunity motion, wait for both of them to be ready.

20           THE COURT: That's fine.

21           MR. LEVY: I don't want to get mixed into what the  
22 settlement discussions have been and so on, that wouldn't be  
23 appropriate. But if the issue is equal protection, then I  
24 think that the suggestion made by Ms. Seeley earlier could  
25 really help to resolve that.

1           In other words, we could try to reach a resolution  
2 with an understanding that we will come back to you if there  
3 is an equal protection question and let you decide it right  
4 off the bat.

5           In other words, we could have a settlement agreement  
6 that we all thought was appropriate. And if we think there is  
7 a potential for a challenge, we bring that agreement to you  
8 and we offer briefs, and the unions can brief, and the white  
9 fire fighters can brief that issue. You could decide it and  
10 we'll see if we have a settlement on it.

11           MR. LEMONEDES: I'm not quite understanding what  
12 Mr. Levy is saying. It seems to me the big roadblock all  
13 along has been the equal protection issue. To attempt to  
14 suggest that we could come to an agreement about that, I mean,  
15 that is the most significant issue present. If Mr. Levy is  
16 suggesting we will deal with only the economic issues and then  
17 come to Your Honor for the equal protection, I guess we can  
18 consider that.

19           But if what I'm hearing is that Mr. Levy is saying  
20 that we should come to some sort of resolution including  
21 everything before we come to Your Honor, I think I have an  
22 obligation to say to Your Honor that it's very difficult for  
23 the City to be able to do that. I don't know that we can  
24 accomplish that.

25           THE COURT: I understand. Could you sort of clarify

1 your suggestion, taking into account Mr. Lemonedes' comment?

2 MR. LEVY: Yes. Let me just say two things. One of  
3 them is, maybe the easiest thing to do is to present to you  
4 now the equal protection issue, and work out everything else  
5 in the agreement and try to get as early a decision from you  
6 on the basic equal protection question.

7 Which, I think is, is there an equal protection  
8 problem on guarded hiring, which we don't think exists. Is  
9 there an equal protection problem on seniority, which we don't  
10 think exists. And we can just present that to you. I mean, I  
11 don't know if we have a difference with the City on where we  
12 stand on those questions. We may have a difference with the  
13 union, I don't know. But that could be presented.

14 The other way we had thought about this, and which I  
15 was really talking about when I first got up is, in the  
16 settlement, working out a process to have that question very  
17 quickly decided. So that -- and I don't think I'd be  
18 revealing anything to say that we have talked about this  
19 before. I mean, the two sides had talked about the  
20 possibility of settlement agreements that included expedited  
21 methods for getting a resolution to any question that may be  
22 raised by equal protection.

23 But in any event --

24 THE COURT: You can't have a settlement without --

25 MR. LEVY: It would be contingent. Or a part of it.

U.S.A. v. CITY OF NEW YORK

15

1 Maybe it would all be contingent. We could reach a lot of  
2 agreements on this.

3 Maybe you're right, Your Honor. Maybe the only  
4 thing to do to is either see if the things we can work out  
5 that don't raise that issue. It's very hard to imagine. I  
6 mean, there are groups out there that exist for the purpose of  
7 challenging these kinds of cases and the priority hiring and  
8 the seniority issues, and they may become involved.

9 THE COURT: Well, we have the UFA here and I'm sure  
10 they have a strong view on the subject.

11 MR. LEVY: I don't know what their view is on it,  
12 really.

13 THE COURT: Well, I can imagine.

14 MR. BLOCK: Your Honor, just to say this, we have  
15 not been a part of any of these discussions.

16 THE COURT: I understand that.

17 MR. BLOCK: Certainly the union has great concerns,  
18 particularly on the issue of seniority safety issues that  
19 might affect the rights of existing fire fighters to  
20 promotions or to transfers. Seniority has a lot to do with  
21 that. There may be others as well that don't come to mind at  
22 the moment. But certainly the union has a real interest in  
23 those issues.

24 THE COURT: Well, my sense is that it might be  
25 useful for you to spend just a little bit of time with the

1 Magistrate Judge and fine tune where you think there is  
2 difficulty. Then come back to me with a proposal as to how to  
3 proceed on the remedy phase. You may disagree, but at least  
4 I'll know where you stand.

5 And with respect to disparate treatment, after the  
6 Mayor is deposed -- and let me say that the Court very much  
7 appreciates the Mayor's cooperation in scheduling an early  
8 deposition in this matter. I wish that you would send that  
9 message along.

10 MS. SEELEY: I will, Your Honor.

11 THE COURT: We'll be done with that and then you'll  
12 know whether you want to move for summary judgment on  
13 disparate treatment or not, and we'll be off. Then we can go  
14 along.

15 In the meantime, we can discuss how to proceed on  
16 the remedy phase. I'm willing to establish a remedy, but my  
17 feeling is it's in everyone's best interest to find the remedy  
18 that does the most good and the least damage to the interested  
19 parties. It may be a Pollyanna, but it's been done before.  
20 And it really depends on a number of factors and the good  
21 faith of all the parties, as well as the UFA, which is going  
22 to be a party with respect to the remedy phase.

23 So I'm going to send you to Judge Mann. She's here  
24 for another week. She said she can meet with you once before  
25 she goes on vacation. It may be that when you finish talking

1 to her, you come back to me and say it's back. It's back in  
2 my court, so to speak, and I'll accept that. But I would at  
3 least like you to have that discussion with Judge Mann because  
4 she is the person who's been engaged in the settlement  
5 discussions and she has indicated to me a willingness to be  
6 helpful, if at all possible. So that's where I am.

7           Then what I'd like from you, from the parties, a  
8 plan, in writing. And where you disagree on how to proceed,  
9 you'll tell me. Where you agree on how to proceed, you'll  
10 tell me. And then I can call you all together and we can have  
11 an intelligent discussion on the next steps.

12           This is complicated, obviously, because we have  
13 disparate interests at play here. I'm very well aware of  
14 that. If we were to have a disparate treatment trial, I would  
15 schedule it for September 21st. If you believe that we should  
16 have a trial, I would like to know how long the plaintiff's  
17 intervenors case will be, who the witnesses would be. And I  
18 would like the same information from the defendant.

19           Any other issues that we need to discuss today?

20           MR. LEVY: Do we have a date to appear before the  
21 Magistrate?

22           THE COURT: I didn't get a date but it will be  
23 sometime next week. You can check with her chambers when you  
24 leave here. I'm sure she'll give you a day and time.

25           MR. BLOCK: Your Honor, you may recall you denied



1 our intervention motion saying we could renew that at the  
2 remedy phase. I don't know if you would consent for us to now  
3 intervene strictly on the remedy phase and the disparate  
4 impact case.

5 THE COURT: Does anyone object?

6 MR. LEVY: I don't object to them intervening and  
7 being involved with certain aspects of the remedy phase that  
8 effect the members of the union. But there are parts of the  
9 remedy that really have nothing to do with the union; back pay  
10 and other kinds of damages that may float to members of the  
11 class.

12 Frankly, it's hard enough to have the discussions  
13 with us and the government and the city and bringing in  
14 another party in that doesn't really have a stake in those  
15 issues, is not helpful, I think.

16 THE COURT: In that case, why don't you make a  
17 formal application. It can be in the form of a letter, if you  
18 wish.

19 MR. BLOCK: Yes.

20 THE COURT: When can you have that to me?

21 MR. BLOCK: By the end of this week, early next  
22 week. Let's say Tuesday of next week.

23 THE COURT: That's fine. And responses from the  
24 parties by a week from Tuesday.

25 All right?

U.S.A. v. CITY OF NEW YORK

19

1 MR. BLOCK: Thank you.

2 THE COURT: That way I will know what the issues are  
3 with regard to the nature of the intervention.

4 MS. SEELEY: Your Honor, one other question: Do we  
5 have a date for the submission of the written plan if we come  
6 back from the Magistrate Judge or do you intend to set that  
7 after you hear what happens with the Magistrate Judge?

8 THE COURT: As much as I would like to believe that  
9 you will be successful, I think I need to operate on the  
10 theory that you won't be successful and set a date for the  
11 plan.

12 Do you have a date in mind?

13 MS. SEELEY: Your Honor, I would suggest three  
14 weeks, but I know some other people have vacations and other  
15 issues this month.

16 MS. PESTANA: I'm going on vacation. I'll be gone  
17 after next week. So anytime after Labor Day would be fine.

18 THE COURT: You're so fortunate, there are three of  
19 you.

20 MS. PESTANA: They want to go on vacation the last  
21 week in August after the Mayor's deposition.

22 MR. LEMONEDES: Which has been interrupted for the  
23 deposition.

24 THE COURT: What?

25 MS. PESTANA: He didn't get to try the disparate

U.S.A. v. CITY OF NEW YORK

20

1 treatment case, so he's getting to defend the Mayor as a  
2 consolation prize.

3 THE COURT: I see.

4 MR. LEMONEDES: As Your Honor thinks of that, also,  
5 can I just ask you to consider, if we're talking about a  
6 September 21 trial, and there may possibly be motions, can you  
7 calculate that into when you expect the motions to be  
8 presented to Your Honor.

9 THE COURT: I think that you can provide me with the  
10 proposed plan by the 11th of September. It's a Friday. It's  
11 the Friday after Labor Day.

12 MR. LEVY: Could I ask that we do that -- give us  
13 one more week. Because Dana, who's been most involved in this  
14 case, is away the first two weeks, getting married in  
15 September.

16 THE COURT: Fine. The 18th. I'll reschedule the  
17 trial to a date in October. I don't need to do that now.

18 MR. LEMONEDES: I do have another commitment in  
19 October which I'm already committed to. If I could just point  
20 that out to you.

21 THE COURT: Fortunately, there are 800 lawyers in  
22 the Corporation Counsel office.

23 MR. LEMONEDES: There are.

24 THE COURT: You have a lot more flexibility than  
25 anyone else in this room. So I'm sure you'll avail yourselves

U.S.A. v. CITY OF NEW YORK

21

1 of the talent that you have over there. You may even get some  
2 of the supervisors to take on a litigation. There are many  
3 talented people there, I know. So you all will figure it out.

4 MR. LEMONEDES: Thank you.

5 THE COURT: Sure.

6 Is there anything else for today? Is everything  
7 clear?

8 MR. SCHACHNER: One question, Your Honor, in terms  
9 of when we see Magistrate Judge Mann next week, should the UFA  
10 be present or by the time we see her, Your Honor will decide  
11 the intervention motion?

12 THE COURT: They will be involved in some manner,  
13 shape or form so I would like the UFA to be present for that  
14 discussion, rather than to have to do it twice.

15 MS. SEELEY: The first thing we're going to have  
16 talk about is the equal protection issue, which Magistrate  
17 Judge Mann herself said goes to the competitive seniority  
18 question. So they should be there.

19 THE COURT: So there you go. That's fine.  
20 Do you have anything else, Mr. Levy?

21 MR. LEVY: No, Your Honor.

22 THE COURT: Do you have anything else?

23 MS. SEELEY: No, Your Honor.

24 THE COURT: Does the City have anything else?

25 MS. PESTANA: No.

1 THE COURT: Would it be useful to set a date for  
2 another conference so we know that we have that. Why don't I  
3 have a status conference with you after Labor Day, just to  
4 find out where you are on the various issues.

5 How about Monday, September 14th at 11:00 a.m. I'm  
6 trying a case that day, but a Magistrate Judge is selecting  
7 the jury so I will have the morning available. We may have to  
8 meet in a different courtroom, the Magistrate Judge is using  
9 this courtroom for jury selection.

10 All right. Anything else from anybody?

11 MS. SEELEY: No.

12 THE COURT: Okay. If I think of anything, you'll be  
13 informed presently. Those of you who are going on vacation,  
14 rest up. Thank you.

15 MS. SEELEY: Thank you, Your Honor.

16 MR. LEVY: Thank you, Your Honor.

17

18

19

20

21

22

23

24

25